28

FILE COPY

Office Supreme
FIL
JAN 3
CHARLES

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1934.

No. 234

THE UNITED STATES OF AMERICA EX REL. CHICAGO GREAT WESTERN RAILROAD COMPANY, AND THE KANSAS CITY SOUTHERN RAILWAY COMPANY,

Petitioners,

vs.

INTERSTATE COMMERCE COMMISSION, ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL.,

Respondents.

PETITION FOR REHEARING ON BEHALF OF PETITIONERS.

RALPH M. SHAW,
S. W. MOORE,
F. H. MOORE,
A. F. SMITH,
FRANK H. TOWNER,
Counsel for Petitioners.

THE GOTTSDOF-HARRIS PRINTING COMPANY, 350 WEST JACKSON, CHICAGO

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1934.

No. 234.

THE UNITED STATES OF AMERICA EX REL. CHICAGO GREAT WESTERN RAILROAD COMPANY, AND THE KANSAS CITY SOUTHERN RAILWAY COMPANY,

Petitioners,

vs.

INTERSTATE COMMERCE COMMISSION, ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL.,

Respondents.

PETITION FOR REHEARING ON BEHALF OF PETITIONERS.

Now come Chicago Great Western Railroad Company and The Kansas City Southern Railway Company, petitioners herein, and respectfully pray the Court to grant a rehearing, and as reasons therefor submit the following:

From the opinion of the Court and the record in the case, the following facts are obvious:

(1) This Court felt that the operating agreement at Kansas City was inequitable. Upon that point this Court said:

> "The Commission's report indicates that the operating agreement is inequitable, since it calls for payments by the smaller lines in excess of benefits derived and permits the larger lines to enjoy the use of the facilities at an expense proportioned to use much less than that imposed upon the smaller users."

(2) On the same point the Court of Appeals went even further. It said (R. 207):

> "This suggestion of the Commission that the roads voluntarily amend the contract was obviously the result of the conclusion, inevitable in the circumstances, that the smaller railroads had made an unwise and oppressive agreement which, in the light of subsequent events, seriously impaired their ability to operate their properties on a satisfactory basis, and there can be no reasonable doubt either of the fact or the result. * * * No further illustrations are needed to show that the contract according to its terms imposes on the smaller lines payments altogether in excess of benefits received, and we have no reason to doubt that if the contract were now in the making the user basis as applied both to fixed charges and operating expenses would be considered the only fair and reasonable method to adopt."

(3) The petitions of petitioners to the Commission were denied because a majority of the Commission was of the opinion that the Commission was without power to give the requested relief. On this point this Court said:

> "We are, however, of opinion that, fairly considered, the report does not bear the construction contended for, but shows the Commission, upon analysis of the complaint and the evidence, found that the Act did not confer authority to accord the relief demanded."

(4) The order entered by the Commission denying the relief was negative in form and substance. Accordingly, petitioners were unable to proceed by injunction. Mandamus was their only remedy. On this point this Court said:

> "But the order here made was negative in form and substance—the refusal of relief—and the remedy by suit in equity was therefore not available to the petitioners."

(5) From the foregoing it is obvious that petitioners may be entitled to relief, but have no remedy unless the writ issues *or this Court at least decides the question of*

law involved. This Court held in its opinion that this fact did not justify the issuance of the writ, but *petitioners respectfully submit that even so, the Court should at least decide the question of law involved.*

In its opinion in the instant case this Court did not decide the all-important question presented. Without deciding that question, this Court affirmed the decision of the lower court, not because the reasoning of the lower court was sound, not because the decision of the Commission was sound, but for the reason, as stated in the opinion, that where,—

> "the matter is not beyond peradventure clear, we have invariably refused the writ, even though the question were one of law as to the extent of the statutory power of an administrative officer or body."

Nine prior decisions of this Court are cited by this Court in support of its conclusion. Petitioners respectfully submit that none of them justify the application of the rule as stated. We have not been able to find any case where this Court has denied a request for mandamus because the Commission's power was debatable. On the contrary, in every case where a writ was issued, the question of the Commission's power was doubtful until finally determined by this Court.

In the *Humboldt Steamship Case,* 224 U. S. 474, the question of law could not have been clear beyond peradventure. The Supreme Court of the District of Columbia had dismissed the petition, and its judgment had been reversed by the Court of Appeals. *The correct interpretation of the law on the subject was not known until this Court affirmed the judgment of the Court of Appeals.*

In the *Louisville Cement Company Case,* 246 U. S. 638, the question of law could not have been clear beyond peradventure. The Supreme Court of the District had denied the writ, and its judgment had been affirmed by the Court

of Appeals. Nevertheless, this Court differed from the two lower courts and directed that the writ issue.

In the *Kansas City Southern Case,* 252 U. S. 178, the question of law could not have been clear beyond peradventure. The Supreme Court of the District had denied the writ, and its judgment had been affirmed in the Court of Appeals by a divided court. It was not until this Court reversed the decision of the two lower courts and directed the issuance of the writ that any one knew certainly what the law was.

Nor have we been able to find a case in which the Commission denied a power or duty and in which mandamus was denied by this Court without a consideration of the statute involved and a determination that the claimed power or duty did not exist.

Thus, in the *New York, New Haven & Hartford Railroad Case,* 287 U. S. 178, there was a determination that the statute did not impose upon the Commission the asserted duty. In that case also, the existence of the duty was doubtful, for the Supreme Court of the District had dismissed the petition, the Court of Appeals had reversed the judgment of the Supreme Court of the District, and this Court in turn reversed the decision of the Court of Appeals. This Court did not deny the writ because the case was doubtful. It denied the writ because it decided that the asserted duty had not been imposed by statute.

In the *Los Angeles Case,* 280 U. S. 52, the claimed power of the Commission was doubtful, for the Supreme Court of the District had dismissed the petition, the Court of Appeals had reversed the judgment of the District Court, and this Court reversed the judgment of the Court of Appeals. Instead of refusing the writ for the reason assigned in the case at bar, this Court discussed the debated question of law at great length and finally reversed the Court of Appeals and affirmed the District Court because, as this Court

held, the asserted power had not in fact been vested in the Commission.

Conclusion.

Petitioners respectfully submit to this Court that they brought this case in order to have the legal question decided. They had and have no other way to get it decided. Yet, under the decision herein, the very existence of the question which made recourse to this Court necessary is assigned by this Court as its *sole reason for the denial of the writ.*

Petitioners respectfully submit that such a conclusion is not sustained by previous decisions of the Court and constitutes a departure from the rule applied in previous cases in which mandamus against the Commission has either been granted or denied. In each of such cases, petitioners respectfully submit that the question of law was decided.

Irrespective of technical legal argument, the record in this case presents a question of primary importance. Petitioners are now subjected to an inequity which is damaging not only to them but to the public interest, but are precluded from securing relief, even though the law may prohibit the inequity.

Petitioners, therefore, respectfully pray that this petition for rehearing may be granted, to the end that it may be determined whether or not the Interstate Commerce Commission has the power which petitioners claim for it.

Respectfully submitted,

Ralph M. Shaw,
S. W. Moore,
F. H. Moore,
A. F. Smith,
Frank H. Towner,
Counsel for Petitioners.

CERTIFICATE OF COUNSEL.

I, Frank H. Towner, one of the counsel for Petitioners herein, do hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay.

Frank H. Towner